proval by the Board.[3] Under these circumstances resolution of the issue in this case would be of no practical consequence, even though the case is not technically moot. Review by this Court is therefore not warranted. See *Terminal Freight Cooperative Assoc.* v. *Samoff*, No. 1481, O.T., 1969, certiorari denied, 398 U.S. 965; cf. *McLeod* v. *General Electric Co.*, 385 U.S. 533.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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National Labor Relations Board.

MAY 1971.

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[3] Petitioners brought suit in the district court to enjoin the settlement negotiations, partly on the ground that they had not participated in the negotiations. The district court dismissed the suit for want of jurisdiction (Pet. 8, n. 6). A stay of that decision pending appeal was denied by both the court of appeals and Mr. Justice Blackmun (*Sears, Roebuck and Co.* v. *Solien*, 1970 Term, application denied, August 19, 1970). That case is currently pending before the Eighth Circuit. The Board has stayed its consideration of the settlement stipulation pending decision by the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1588

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

A. REPLY TO THE REGIONAL DIRECTOR'S OPPOSITION.

In his memorandum in opposition to the instant petition for writ of certiorari, Respondent Regional Director argues that the petition should be denied because a resolution of the substantive questions presented would be of "no practical consequence" in this case. In essence, this contention reduces to a claim that the case is moot,—although the Director does concede that it "is not technically moot",—since the very facts marshalled and the authorities cited

in support were urged on the court below as establishing such "mootness".

This contention is challenged and requires response.

In the court below, this same contention was urged, supported by the same facts alleged here, in an effort to induce the court to decline resolution of the substantive issues raised. That court, in reliance upon cited decisions of this Court and of various subordinate courts, and upon the considered views of legal scholars, concluded that,—notwithstanding the termination of hostilities and the attempted unilateral settlement by the two Respondents of the underlying dispute:

> "However, we feel *in this case* there are cogent reasons for passing upon the merits of the appeal even should the pending settlement stipulation be so approved. We are impressed with the arguments of appellants that the alleged errors committed in the Section 10(l) proceedings are *inherently evasive of review* since it is not feasible to perfect and obtain an appellate review prior to the Board's 'final adjudication'. . . . the doctrine of mootness should not be used to perpetually frustrate judicial review of *issues of public importance* arising in otherwise justiciable cases, . . .
>
> "We conclude that these appeals are not moot; furthermore the policy of ensuring judicial review of *issues of public importance* which are *inherently evasive of review* compels us not to refuse review on the basis of mootness." (A. 48) (Emphasis added)
>
> "We do not think the case is moot because the *probability of repetition of unlawful secondary boycott activity* by the Union in the instant case is sufficient to satisfy the 'mere possibility' test articulated in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953)." (A. 47) (Emphasis added)

Under the authorities cited by the court below, being principally decisions of this Court, there is no longer any reasonable dispute that cases are not moot in which the following three tests are satisfied:

1) There is a possibility of recurrence of the charged unlawful conduct;
2) The issues to be decided are of public importance; and
3) Those issues are inherently evasive of review.

Each of these tests discussed *seriatim* below, is satisfied in the instant case and *neither* the Director nor the Union disputes that fact.[1]

First, neither Respondent contends that the unlawful picketing which gave rise to this case cannot recur. Indeed, they are barred from so arguing by decisions of this Court, as, for example, *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *N. L. R. B.*, 357 U. S. 93, a case whose facts in all material aspects mirror those in the instant proceeding. In *Local 1976,* a union had engaged in an unlawful secondary boycott, had ceased such conduct subsequent to the filing of charges against it, and had then settled the underlying dispute which had given

1. In lieu of addressing himself to these tests (other than to concede both the likelihood of recurrence and the fact that the case is not "technically" moot) the Director relies on this Court's decision in *Terminal Freight Cooperative Association, et al.* v. *Samoff,* 398 U. S. 965, in which this Court declined to review a decison of the Third Circuit holding a case to be moot in which a similar issue was raised by charging parties concerning their status under Section 10(l). Apart from the fact that the Third Circuit's conclusion—that the case was moot in view of the cessation of picketing and the execution of a contract—is in direct conflict with the judgment of the court below, it is appropriate to note that the Third Circuit, unlike the court below, rendered its decision wholly without reference to or apparent consideration of the criteria listed above.

In any event, this Court's refusal to review that case is not controlling here in view of the fact that the petition for certiorari filed there sought both a decision from this Court *on the merits before judgment below* as well as a reversal of the court's conclusion of mootness. This was a procedural posture not conducive to review by this Court, an obstacle not present in the instant case. In addition, the regularity with which the substantive issues presented by both cases would continue to arise was not known when the earlier petition was denied; this further distinction, quite apart from other differences between the cases, is sufficient to warrant a different result from this Court here.

rise to its unlawful boycott activity by entering into a collective bargaining agreement. In that case, moreover, the parties went so far in order to eliminate the likelihood of a recurrence of the illegal conduct involved as to incorporate into their agreement an explicit pledge by the union not to resume striking. Nonetheless, this Court held that "the controversy was not rendered moot" under these facts; ". . . we cannot say that there was no danger of continued violation". Beyond the specific and controlling decision in that case, analysis of this Court's opinions relating to the meaning of the requirement that injuries must be capable of recurrence in order to avoid "mootness" reveal a broader construction of the concept; it is sufficient that there exists a possibility that the same alleged injury from the same source will recur to the same or to similar persons. (*E.g., Moore* v. *Ogilvie,* 394 U. S. 814.) Since the injury alleged here is the failure to accord "party" status to charging parties in proceedings under Section 10(l), it is clear that the requisite likelihood of recurrence exists: illegal strikes and boycotts will continue to occur; they will be remedied under the same statute as is involved here; charging parties' participatory role under the statute will be interpreted by the same judges and by others who will rely on the adverse precedent below; and the Board will continue to urge the same adverse result in every such case in which any charging party seeks to participate as a full party-litigant in order to protect his unique and legitimate private interests. Finally, in agreement with this argument, —hence in agreement with the court below, —the Director concedes the point in his Memorandum, at page 3:

> ". . . the issue is a recurrent one in the administration of the Act, . . ."

Second, the issues raised are of public importance. This conclusion, adopted by the court below, was apparently adopted by this Court as well since, within the last two

years, this Court has granted petitions for writs of certiorari in two cases which raised essentially the same issue as is involved here.[2] That importance derives from the fact that a resolution of the proper role of charging parties under Section 10(l) involves a determination of Congressional intent in an area in which Congress took great pains to create broad rights and afford sure relief from what Congress conceived to be the single most harmful type of unfair labor practice banned in the Act. And apart from the significance of achieving an orderly judicial clarification of the law in an area which has spawned so much litigation and "is a recurrent [problem] in the administration of the Act," the issues are of great practical importance to charging parties. At stake, for example, is their right to take prompt and independent action in the district courts, in support of the Board's injunction petition, which the Board, lacking the charging parties' information or personal interest in the outcome, may fail to take.[3] Similarly at stake is the charging parties' right to appeal adverse district court decisions which the Board, often for tactical or budgetary reasons unrelated to the merits of the case, declines to appeal.

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2. *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U. S. 655; *The Los Angeles Herald Examiner, et al.* v. *Kennedy*, ... U. S. ....., 75 LRRB 2379 (No. 350, Oct. 12, 1970). Although certiorari was granted in each, both cases were adjudged moot without resolution of the substantive questions presented.

3. In the instant case, for example, one of the respects in which the denial of "party" status to the charging parties has resulted in practical injury is that, according to the Board, at least, they are deemed to lack standing under Section 10(l) to bring to the district court's attention a resumption of lawful conduct when the Board elects to permit its pending junction petition to remain inactive on the court's docket. This is a common problem in situations where the Board and the Respondent Union enter into a Stipulation (as they did here) in lieu of securing an injunction; the Board's petition remains inactively on file and not even a resumption of picketing results in the securing of injunctive relief unless and until the Board is disposed to bring the matter to the court's attention and to seek to cause a hearing to be convened.